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No. 86-588

In The
Supreme Court of the United States
October Term, 1986

AETNA CASUALTY & SURETY COMPANY,
a Connecticut Corporation,

Petitioner,

v.

SMITH PLUMBING COMPANY, INC., an Arizona Corporation, dba WHITE MOUNTAIN SUPPLY COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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QUESTIONS PRESENTED

1. Whether petitioner has standing to assert the legal rights or interests of a third party, i.e., that the exercise of state court jurisdiction over petitioner as surety on a bond on which a development enterprise of an Indian tribe is the principal will infringe upon tribal self-government.

2. Whether an incident of the federal policy underlying the requirement of a performance and payment bond on Indian housing projects is that a beneficiary of such a bond may bring an action thereon in state court against the surety.

3. Whether allowing a beneficiary of a performance and payment bond on an Indian housing project to bring an action thereon in state court against the surety infringes upon tribal self-government.

RULE 28.1 LISTING

Respondent Smith Plumbing Company, Inc. is a closely held Arizona corporation doing business as White Mountain Supply Company and has no parent company or any subsidiaries or affiliates.

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STATEMENT OF THE CASE

Respondent hereby incorporates the facts recited in the opinions below. With regard to petitioner's statement of the case, it should be clarified that respondent supplied construction materials *outside* the reservation. (Appendix to Petition 59a). Furthermore, the tribal council indemnification resolution did not indemnify petitioner. Instead, it merely authorized the tribal chairman to enter into an indemnification agreement. However, no such agreement is a part of the record below. (Appendix to Petition at 44a, 68a-69a).

REASONS WHY THE PETITION SHOULD BE DENIED

1. Petitioner lacks standing to raise the question presented in the petition.

This Court has held that a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* 422 U.S. 490, 499 (1975). That rule applies equally where a litigant asserts the rights of third parties defensively, as a bar to judgment against him. *E.g., McGowan v. Maryland,* 366 U.S. 420, 429-430 (1961).

Aetna Casualty & Surety Company, the sole petitioner herein,[1] argues in the petition (p. 15) that "state assump-

1. Although the White Mountain Apache Tribe dba Apache Development Enterprise intervened below, the Enterprise successfully moved the trial court for dismissal of the action

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tion of jurisdiction [over Aetna] infringes upon the tribe's right of self-government." Petitioner does not argue that the decision below violates any of petitioner's legal rights or interests. Inasmuch as petitioner cannot assert the personal defenses of its principal (Appendix to Petition at 8a-9a),[2] petitioner has no standing to contend that a judgment against it will infringe its principal's rights.

2. An incident of the federal policy requiring a performance and payment bond on Indian housing projects is that a beneficiary of such a bond may bring an action thereon in state court against the surety.

Petitioner ignores the fact that the decision below promotes the federal policy underlying the requirement that contractors building Indian housing furnish performance and payment bonds. That policy, discussed more thoroughly in the decision below (Appendix to Petition at 25a-34a), facilitates the construction of Indian housing by providing bonding protection so as to encourage subcontractors and suppliers to participate in such construction projects. To further that policy, beneficiaries of the required

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against it. On appeal, respondent sought relief only against petitioner, and the dismissal as to the Enterprise was affirmed. The Enterprise has not petitioned for certiorari, and as a successful party, has no standing to do so. *E.g., see Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980) ["A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it."].

2. Petitioner's footnote contention (Petition, n. 8 at pp. 15-16) that the Arizona Supreme Court erroneously held that sovereign immunity is a personal defense is not encompassed by the Question Presented.

bonds must have the same rights as they would when dealing in the private sector, i.e., the right to sue on the bonds in state court.

3. Allowing a beneficiary of a performance and payment bond on an Indian housing project to bring an action thereon in state court against the surety does not infringe upon tribal self-government.

Petitioner misinterprets *R.J. Williams Co. v. Fort Belknap Housing Auth.*, 719 F.2d 979 (9th Cir. 1983), in arguing that the adjudication of respondent's claim against the subject bond in state court would infringe upon tribal self-government. To reach that conclusion, petitioner contends that such an action interferes with the tribe's interest in self-government in one of the two ways described in *R.J. Williams*, namely, that:

> "the dispute itself calls into question the validity or propriety of an act fairly attributable to the tribe as a governmental body . . . ."

719 F.2d at 983. The "act" in question, according to petitioner, is the Tribe's ultimate payment of respondent's claim. However, petitioner's argument puts the cart before the horse because respondent's action cannot call into question an act that has yet to occur. Moreover, respondent's action does not challenge the "validity or propriety" of the Tribe's ultimate payment of respondent's claim. Accordingly, there is no infringement of tribal self-government in the manner set forth in *R.J. Williams*.

Secondly, contrary to petitioner's argument, the entry of judgment against petitioner will not bind the Tribe, and therefore, will not infringe upon tribal self-government. Although a judgment against a surety may ordi-

narily bind the principal, the principal herein, the Tribe's development enterprise, retains its sovereign immunity despite the entry of judgment against petitioner. Because the Tribe will not be bound by a judgment against its surety, the Tribe will not be compelled to defend its surety in state court.

If the Tribe will be bound by a judgment against petitioner, and therefore feels compelled to defend its surety, it will only be because the Tribe was contractually or otherwise obligated to indemnify its surety *and* had waived its sovereign immunity to suit by petitioner. In that case, respondent's state court action against petitioner cannot be said to infringe tribal self-government inasmuch as the Tribe is subject to suit by petitioner for indemnification.

Incidentally, petitioner's footnote reference in the petition (n. 9 at pp. 16-17) to *Ramey Const. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315 (10th Cir. 1982), is in error. Whether a surety may assert its principal's sovereign immunity as a defense was not an issue in *Ramey*. Nevertheless, petitioner surmises that the claim against the surety in *Ramey* was dismissed and that it was dismissed on the basis that the surety was entitled to assert the sovereign immunity of its principal. However, the opinion does not discuss any adjudication of the claim against the surety and what petitioner surmises is not necessarily true. Partial summary judgment was entered against the tribal defendants for the withheld retainage under the construction contract. Although the nature of the claim against the surety is not stated, the retainage claim was possibly the only claim against the

surety inasmuch as the scope of the payment and performance bond therein likely did not include the interest and consequential damages claimed against the tribal defendants. Therefore, it is equally possible to surmise that the action against the surety was concluded by summary judgment for the plaintiff.

Finally, although respondent disagrees that it had a commercial relationship with the Tribe or that it performed any act submitting it to the jurisdiction of the tribal court, whether either is true is immaterial to whether a state court action against the Tribe's surety infringes upon tribal self-government.

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CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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